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In the Supreme Court of the United States

OCTOBER TERM, 1971

Nos. 71-1115, 71-1122, 71-1241, 71-1251, 71-1253, 71-1254, 71-6428

HOUSEHOLD FINANCE CORPORATION, NATHANIEL W. BARBER and JAMES S. PRATT,
PETITIONERS,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT,
AND RELATED PETITIONS

CONSOLIDATED BRIEF OF THE COMMONWEALTH OF MASSACHUSETTS IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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Opinion Below

The opinion of the Supreme Judicial Court of Massachusetts, which was rendered on November 4, 1971, is reported in 1971 Massachusetts Advance Sheets beginning at page 1367 and in 275 Northeastern Reporter 2d begin-

ning at page 33. It has been reprinted as an appendix to several of the Petitions.[1]

Jurisdiction

The petitioners seek to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3). On January 25, 1972 Mr. Justice Brennan extended the time for filing the petitions to and including March 3, 1972. By order of the Clerk of this Court dated April 24, 1972 the time for filing this Consolidated Brief in Opposition was extended to and including May 24, 1972.

Questions Presented

1. Should this Court review certain matters connected with the indictment of petitioners, including the involvement of a legislative commission, the number of prosecutors present at grand jury proceedings, and the sufficiency of evidence before the grand jury, which matters are not of general importance, when the record shows the return of the indictments were fully consistent with Massachusetts law and Constitutional standards?

2. Should this Court review a decision of the Massachusetts Supreme Judicial Court interpreting Massachusetts statutes concerning jury selection which ruled that those statutes were not violated and which affirmed the ruling of the Trial Court after full hearing that the petitioner's evidence was insufficient to demonstrate that there had been any systematic or intentional exclusion of any group in the community?

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[1] For convenience of reference, and to avoid duplication, reference to the opinion will be made to the appendix to the Household Petition. Pages of the opinion will be designated by the symbol "App." followed by the appropriate page as appearing in the Household Appendix and in the Massachusetts Advance Sheets.

3. Should this Court review petitioners' claim that their motions for severance were wrongfully denied when the record shows the overwhelming benefits of joinder and joint trials on these unique facts and where trial was conducted in a manner fully consistent with the highest standards of fairness?

4. Should this Court review these convictions because, in accordance with a Uniform Law, the Commonwealth represented and the Trial Court certified, that certain out-of-state witnesses were material to the Commonwealth's case tried before a jury?

5. Should this Court review the sufficiency of the evidence supporting Woodcock's conviction when such a claim turns on individual facts affecting only Woodcock and there was ample evidence that Woodcock conspired with individuals in other corporations to offer bribes to an executive officer of the Commonwealth?

6. Should this Court review the petitioner Liberty's contention that it cannot be convicted of a crime committed for its benefit by its Executive Vice President, where such an issue involves no federal question but rather turns on its own facts and would affect few if any other litigants?

7. Should this Court review a contention that a statute was applied in an ex post facto manner where the trial Court actually did nothing more than apply long standing existing precedent to the facts of this case?

8. Should this Court review convictions in the trials of uniquely complex conspiracies where both trials were conducted with scrupulous attention to the rights of the individual defendants, where the Trial Court strongly instructed the jury to apply the limitations on evidence as it had previously announced them to the jury, where those limitations had been argued to the jury in closing, and where there is no showing that the jury did other than convict on the evidence as limited, because the petitioners

assert that the human mind cannot perform feats of remembering all such limitations and that the Court deferred to the prosecutor?

9. Should this Court review a contention that the mere posing of special questions to a jury is violative of due process of law where it is clear that the jury returned general verdicts as to each of the substantive bribery counts and the answers to the questions demonstrate that the jury was in no way coerced or influenced to bring in guilty verdicts?

10. Should this Court review contentions of prosecutorial misconduct and nondisclosure of evidence in the face of a contrary determination by the Supreme Judicial Court, when such questions turn on their own facts affecting few other litigants and there is ample support in the record for that Court's decision and where the evidence which is claimed to have been withheld is neither exculpatory nor material?

11. Should this Court examine 20,000 pages of transcript to review the evidence which shows two separate prosecutions for two sharply distinct offenses because petitioners rely on the similarities of language in two conspiracy indictments to raise double jeopardy claims in the second trial?

12. Should this Court review the contention of the petitioner Hanley, a lawyer and a member of the Massachusetts Bar, that he was not advised of his right to counsel when the record shows clearly that he was fully so advised?

Statement of the Case

Seven petitions have been filed asking that a writ of certiorari issue to the Supreme Judicial Court of Massachusetts to review the judgment of that court affirming the convictions of the various petitioners for bribery or conspiracy to do so. The petitioners are as follows: No. 71-1241, Household Finance Corporation, Nathaniel W.

Barber and James S. Pratt (hereafter referred to as "Household Petition"); No. 71-1122, Beneficial Finance Co. and Edward R. Newhall (hereafter referred to as "Beneficial Petition"); No. 71-1115, John M. Farrell and Francis T. Glynn (hereafter referred to as "Farrell Petition"); No. 71-1254, Liberty Loan Corporation (hereafter referred to as "Liberty Petition"); No. 71-1253, Lyle S. Woodcock (hereafter referred to as "Woodcock Petition"); No. 71-1251, Local Finance Corporation (hereafter referred to as "Local Petition") and No. 71-6428, Martin J. Hanley (hereafter referred to as "Hanley Petition").

These petitions arise out of two separate series of indictments and two separate jury trials.[2] Beneficial Finance Company (Beneficial), Household Finance Corporation (Household), Liberty Loan Corporation (Liberty), John M. Farrell (a "public relations man" for Beneficial and an officer of one of its subsidiaries), Francis T. Glynn (a "public relations man" for Beneficial, and an employee of one of its subsidiaries), Nathaniel W. Barber, (a "public relations" employee of Household), James S. Pratt (also a "public relations" employee of Household), Lyle S. Woodcock (an Executive Vice President of Liberty), Morris Garfinkle (a member of the Massachusetts Small Loans Regulatory Board) and Martin J. Hanley (Deputy Commissioner Banks and Supervisor of Loan Agencies of the Commonwealth of Massachusetts) were convicted in the first trial. The defendants convicted in the second trial were Local Finance Corporation (Local), Household, Beneficial, Hanley, Farrell, Glynn, Barber,

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[2] The symbols "IR", "IIR", "P.T.Tr.", "I Tr." "II Tr." and "Post Tr." preceded by the appropriate volume number and followed by the appropriate page number refer respectively to the Record in the first and second trials and to the transcripts in pretrial proceedings, the first trial, the second trial and the post trial proceedings in the first trial. Exhibits are described by the appropriate symbol followed by an exhibit number.

Pratt and Edward R. Newhall (another Beneficial "public relations man", also employed by a Beneficial subsidiary).

In each case the various defendants were charged under indictments returned in 1964 by a special grand jury. The indictments were presented as the result of an investigation developed by the Massachusetts Crime Commission (Commission), a body created by the General Court of the Commonwealth "to investigate and study as a basis for legislative action the existence and extent of organized crime within the Commonwealth and corrupt practices in government at state and local levels." Massachusetts Resolves of 1962, c. 146 (1962) (App. 1368).

These cases, commonly known as the "small loans" trials, are believed to be the longest and most time consuming in Massachusetts' history. Petitioners' pretrial motions were heard for sixty-five court days and span 4,370 transcript pages. The decisions by the Trial Court on these motions cover about 700 pages. Forty-nine of the indictments were grouped for the first trial, which began on July 18, 1966 and lasted about five months. The defendants took 1916 exceptions to rulings by the Trial Court. The transcript of evidence in the first trial consists of 103 volumes containing more than 7,500 pages and the Record of pleadings, motions and decisions in the first trial fills 18 bound volumes. The second trial, involving 21 indictments, began on July 17, 1967 and took up 222 trial days over a period of twelve months. The defendants took 2431 exceptions to rulings by the Trial Court. The transcript consists of 223 volumes containing more than 11,800 pages. The Record of pleadings, motions and decisions in the second trial fills 19 bound volumes. The findings, rulings and decisions of the trial judge in all proceedings connected with these cases contain more than 1400 printed pages (App. 1368-1369). The Supreme Judicial Court devoted two complete hearing days to the oral argument of these

cases and delivered a careful opinion, meticulously covering and disposing of the points raised by petitioners.

From this exhaustive working out of the judicial process petitioners have culled the twelve points which are discussed below. All these contentions are collateral to the central evidence at the trials, some are supported by fragments of testimony lifted out of the context of extensive and detailed examination, and others are without support in the transcript and record itself. Compare Household Petition, 4, 23 with P.T. Tr. 1966-1981.

I. The First Trial

The evidence at the first trial demonstrated that Beneficial, Household, and Liberty, all of which were licensed small loan companies in the Commonwealth, together with certain of their officers and employees (some of whom were defendants) conspired to bribe Hanley and Garfinkle who were public officials with power to affect the companies' interest rates for "small loans". The purpose of the conspiracy and the bribe was to fix the results of the 1962 hearings before the Small Loans Regulatory Board (Rate Board), in order to maintain high interest rates for regulated small loans (App. 1369).

In 1962 Beneficial, Household, Liberty, and American Investment Company of Illinois (American) were actively engaged in making "small loans" in Massachusetts at rates established by the Rate Board. The petitioner Glynn was then the "Director of Industry Relations" for the Beneficial Finance "System" and formally an employee of one of Beneficial's subsidiaries, Beneficial Management. The defendant Farrell was a vice-president of Beneficial Management, to whom Glynn reported. Pratt was the New England "Regional Director of Public Relations" for Household, and Barber, who was also engaged in public relations work for Household, was Pratt's superior. Woodcock was an Executive Vice President of Liberty. Amer-

ican, doing business in Massachusetts as Public Finance Corporation (Public), had as its New England Regional Director William F. Heath (Heath). Heath was a principal witness for the Commonwealth (App. 1398-1400).

Hanley, a lawyer, was the Commonwealth's Deputy Commissioner of Banks and Supervisor of Loan Agencies. During the summer of 1962 Hanley met with Glynn and Heath three or four times in various restaurants to discuss the upcoming hearings before the Rate Board, and whether to pay money to Hanley to insure a favorable result from the Rate Board. At these meetings Hanley insisted upon handling all aspects of this bribery "program". Heath and Glynn met with Pratt at Purcell's restaurant, and all agreed to recommend the payment of bribes to Hanley and to one or more members of the Rate Board (App. 1400-1403).

At a meeting at the Commodore Hotel in New York, on October 17, 1962, Glynn and Farrell of Beneficial, Pratt and Barber of Household, Woodcock of Liberty, Heath of American and several other persons were present. Glynn recommended the payment of bribes to Hanley and others to insure a favorable result at the Rate Board hearings. Woodcock, Farrell, Glynn, Pratt, Barber and Heath, agreed to offer the bribes, and further agreed that Barber should "handle" the bribery "program" with Hanley (App. 1404-1407).

During subsequent months negotiations were carried on with Hanley regarding the amount of the bribes and Morris Garfinkle, a member of the Rate Board, emerged as one of the members of the Rate Board who would receive a bribe through Hanley (App. 1406-1409).

At the Rate Board hearings in November, 1962 Hanley purported to act on behalf of the Department of Banking. The Rate Board hearings were terminated without changing the existing interest rate. The Chairman of the Board publicly stated that this was done at the request of Mr. Hanley (App. 1408, 1410).

There was further evidence regarding the payment of the money to Hanley, including a statement by Barber to Heath that $25,000 had been paid (App. 1411).[3]

On December 18, 1966 Hanley and Garfinkle were each found guilty of 14 counts of requesting bribes, and also of conspiracy to request bribes. Beneficial, Household, Liberty, Woodcock, Farrell, Glynn, Barber and Pratt were found guilty on the same date of conspiracy to offer bribes to Hanley and Garfinkle and of actually offering bribes to Hanley and Garfinkle.[4]

II. The Second Trial

The evidence presented at the second trial showed that over a period of some seven years (1957-1963) a number of small loan companies, including Household, Beneficial and Local, together with a number of their officers and employees, including Barber, Pratt, Glynn, Farrell and Newhall (another Beneficial "public relations man") conspired to bribe Hanley and that Hanley requested and accepted these bribes. Hanley, by virtue of his office as Deputy Commissioner of Banks and Supervisor of Loan Agencies, had extensive powers to approve or disapprove the activities of small loan companies. Bribes were paid to Hanley during this period to induce him to approve various requests pertaining to routine matters, to induce him to refrain from taking action adverse to the defendants and certain co-conspirators at rate hearings held during 1957, and to obtain various changes in small loan regulations. Unlike the first trial, which centered around one particular event — the payment of money to fix the 1962 Rate hearings — the second trial involved continued payments to Hanley, pursuant to a common scheme, to

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[3] The facts in the first trial are set forth in detail at App. 1398-1411.

[4] In response to special questions propounded by the Trial Court the jury found that the bribe money had never actually been paid (I102 Tr. 7419-7485).

induce him to bestow a variety of favors on the small loan companies (App. 1369-1370).

Heath and one Louis Schwartz (Schwartz), president of Community Finance Company, were important witnesses for the Commonwealth in the second trial. Hanley asked Heath and Schwartz in the summer of 1957 for a bribe in connection with upcoming rate hearings during that year. Schwartz, Newhall of Beneficial, Lerch (a high level employee of Household), Redfield (Heath's superior at American) and others met, and Schwartz relayed Hanley's request. Newhall stated "[W]e'll work something out" (App. 1493-1495).

Newhall later told Schwartz that Newhall was working on the matter and that Schwartz's assessment would be $2,000 payable in installments over a two year period. Newhall gave Schwartz $2,000 to be given to Hanley, and Local's president, one McHenry left an envelope with Schwartz to be delivered to Hanley. In July 1957 Schwartz delivered the bribes to Hanley, together with a $500 payment of his own (App. 1495-1498).

At a meeting in New York City in late 1959 or early 1960, attended by Farrell and Glynn of Beneficial, Lerch of Household, Redfield of American and others, Lerch, Farrell and Redfield stated that they were in favor of expanding the Hanley bribery "program" and changing the allocation of payments among the companies. Subsequent to this meeting the payments to Hanley were reallocated, and the range of favors granted was expanded to include a large number of routine matters. The evidence includes numerous conversations between Hanley and various of the conspirators and among various of the conspirators themselves throughout the seven year period as to the manner of making payments, the timing, amount and allocation of payments and the favors to be granted by Hanley in return for the payments. A large number of

bribe payments were made to Hanley pursuant to the conspiracy. (App. 1498-1514).[5]

On June 10, 1968 Hanley was found guilty on thirty-nine counts of requesting or accepting bribes and Beneficial, Household, Local, Newhall, Farrell, Glynn, Barber and Pratt were found guilty of conspiracy to offer bribes to Hanley.

Reasons for Denying the Writ

I. THERE WAS NO VIOLATION OF DUE PROCESS OR EQUAL PROTECTION IN CONNECTION WITH THE INDICTMENTS.

Beneficial argues at pages 27-31 of its petition that the procurement of the indictments violated its due process rights. Household argues, at pages 36-39 of its petition, that the same process involved a denial of equal protection.[6]

Household asserts, on page 37 of its petition, that "... it was the Massachusetts legislature which secured the indictments of Crime Commission defendants", thus depriving them of the right to indictment by a grand jury in the ordinary course. The opinion below at App. 1371-1373, adopts detailed findings by the Trial Court that the Crime Commission only performed its assigned legislative task of investigation and turned its evidence over to the Attorney General for his review and action. The Attorney General had complete discretion as to prosecution. As an actual matter of fact, found by the Trial Court, Household's contention is erroneous, and raises no federal question.

Marshall Simonds, who investigated these cases for the Crime Commission, was appointed a Special Assistant Attorney General for the purpose of assisting in the presentation of these cases to the Grand Jury. Household and Beneficial argue that performance of this dual role was

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[5] This evidence is set forth in detail at App. 1488-1514.

[6] Woodcock and Liberty each adopt these arguments of Beneficial and Household. (Woodcock Petition, 2 fn.2). (Liberty Petition, 2 fn.1).

improper. (Household Petition, 37-39; Beneficial Petition, 31). However the Trial Court expressly found that Simonds acted under the full control of the Attorney General, that the presentation of evidence was under the supervision of Mr. Travers, an Assistant Attorney General, and that Mr. Simonds' role was only to assist to the degree required by Mr. Travers. Household's statement that Simonds "headed a team which ... handled the interrogation of all witnesses before the grand jury" (Household Petition, 37) is utterly inconsistent with the facts expressly found below. As the Supreme Judicial Court points out at App. 1373-1374, 1377-1378, control of prosecution was at all times in the Attorney General, and Simonds' role was fully consistent with Massachusetts practice and raises no issue appropriate for review by this Court.[7]

Household and Beneficial argue that the number of prosecutors appearing before the grand jury was improper (Household Petition, 38; Beneficial Petition, 27-31). In so doing they ignore the finding of fact by the Trial Court that:

> the number of prosecutors present before the Special Grand Jury at any one time during its hearings, deliberations and voting was no greater than was necessary. All of the prosecutors who were thus present were there in their official capacities, discharging their public duties in connection with this case, and their presence before the Special Grand Jury was necessary at all times when they were present.

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[7] It should be noted that on page 38 of its petition Household distorts the meaning of Mass. Gen. Laws, ch. 12 §30, which prohibits public prosecutors from receiving compensation from private "prosecutors" or complainants. It is apparent that this statute is directed at private, rather than public bodies. Further, the trial court specifically found that the Crime Commission was not the "prosecutor" here (App. 1372).

The Trial Court further found that the grand jurors were not intimidated, coerced, or influenced by the presence of several prosecutors (App. 1374-1375). These findings and the opinion of the Supreme Judicial Court clearly establish that the necessary presence of several prosecutors was consistent with Massachusetts practice and involved no deprivation of equal protection or due process (App. 1374-1376, 1377).

The argument is made by Household and Beneficial that the prosecutor attempted to influence the deliberation of the grand jurors and that the prosecutor otherwise violated his duty of impartiality (Household Petition, 35-39; Beneficial Petition, 27-30). The short answer to this contention is the finding of fact by the Trial Court, not referred to by the petitioners, that there was no such misconduct by the prosecutors (App. 1375), and the opinion of the Supreme Judicial Court that this finding is correct as matter of law (App. 1376).

At pages 37-38 of its petition Household claims that Simonds violated the secrecy of the grand jury proceeding by "massive instances" of improper disclosure to Crime Commission personnel. In so doing Household ignores the detailed decision containing findings of fact and rulings of law made on this point by the Trial Court (I 18R 4218-4238; II 36R 12811-12824). In this decision the Trial Court, after hearing evidence, ruled that all of the Pleas in Abatement alleging improper disclosure were not seasonably filed, if seasonably filed were overruled as not legally sufficient, and if seasonably filed and legally sufficient were disproved on the evidence and therefore denied.

Finally, Household contends that it was improper for a special grand jury to sit at the same time as a regular grand jury sitting in the same county. As the opinion of the Supreme Judicial Court points out, this is perfectly appro-

priate as a matter of Massachusetts procedure (App. 1378).[8]

In summary, none of the issues raised by Household and Beneficial show any violation of Massachusetts law or any deprivation of due process or equal protection. No question which warrants the granting of the petitions has been raised, particularly since the issues would affect few other litigants.

Liberty and Woodcock claim that there was error of constitutional proportions in the denial of their Motions for Leave to file Motions to Dismiss (Woodcock Petition, 13-21; Liberty Petition, 2 n.1). These motions asserted that there was insufficient evidence before the grand jury to warrant the petitioners' indictment. This contention was based on the testimony of Heath contained in a portion of the grand jury transcript which had been made available to the petitioners shortly before filing their motions. At the hearing on these motions petitioners submitted a stipulation of the Commonwealth stating that to the best of the Commonwealth's knowledge this portion was the only testimony relating these defendants to the events occurring on October 17, 1962. It further stated that "[t]he Commonwealth does not recall any other grand jury witness to any talk with Lyle S. Woodcock other than William F. Heath, either before or after October 17, 1962, relative to the matters on trial" (App. 1396).

The Trial Court ruled that these motions were not timely, and that there was insufficient reason to justify discretionary late filing.

This Court has held, on a number of occasions, that it will not look behind an indictment. *Lawn* v. *United States*, 355 U.S. 339, 349 (1958) reh. denied 355 U.S. 967 (1958).

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[8] In footnote 46, at page 31 of its petition, Beneficial asserts that there was improper questioning of talesmen prior to their selection as jurors. This question is covered in detail at App. 1382-1386, and, as appears fully therein, no violation of Massachusetts law or due process is involved.

Costello v. *United States*, 350 U.S. 359, 363 (1956), reh. denied 351 U.S. 904 (1956). *Holt* v. *United States*, 218 U.S. 245, 248 (1910). Here there is no substantial and unsettled question. Rather, there is a question which, while slightly different in its facts from prior cases, falls squarely within the principles enunciated by this Court on at least three prior occasions. Further, as the Supreme Judicial Court points out at App. 1397, the stipulation on which petitioners rely does not exclude the possibility that there was other evidence before the grand jury or inferences from such evidence bearing on these indictments.

Woodcock and Liberty's contentions raise no substantial and unsettled questions and were not properly raised below. For these reasons they provide no ground for the issuance of the writ particularly since they affect only these litigants.

II. The Process of Selecting the Grand Jury and the Petit Jury in Both Trials Did Not Violate Petitioners' Constitutional Rights.

Petitioners assert that the Massachusetts statute governing jury selection was intentionally and massively violated. (Household Petition, 25). They further assert that the composition of the grand jury and trial juries selected differed significantly from the composition of juries which would have been produced if the jurors had been selected in accordance with their interpretation of the Massachusetts statute. The petitioners supplement their argument by asserting that blanket exclusions in violation of the Massachusetts statute were made. Finally, they assert that the trial court improperly eliminated statistical evidence which would have demonstrated the unrepresentative character of the juries selected.

The argument is thus fundamentally a boot strap one.

A Massachusetts statute is stated to have been violated. The violation is then characterized as being done "intentionally and massively". The assumed statutory violation is then equated to an error of constitutional dimension by hypothetical comparison of an undetermined group with unspecified population tables. Petitioners give a perfunctory nod to the long standing constitutional test that the method used to select juries need merely produce a representative cross section of the community. Their failure to prove the lack of a representative cross section is glossed over by the assertion of an alleged error by the Trial Court in eliminating what is stated to be clearly admissible statistical evidence.

The linch pin of this argument is the Massachusetts jury selection statute. (Mass. Gen. Laws ch. 234, §§1, 4) The Trial Court made extensive findings of fact at a hearing on petitioners' contentions and the Supreme Judicial Court of Massachusetts carefully considered the question of whether or not the Massachusetts statutes were violated. Contrary to petitioners' contention, the highest court of Massachusetts adopted the Trial Court's ruling that use of the list of registered voters as the source of the names of potential jurors "did not thereby violate the applicable statutes" (App. 1380). The Supreme Judicial Court also specifically found that the exclusions complained of by petitioners did not violate the Massachusetts statutes.

The interpretation of a Massachusetts statute by the highest court of the state is, of course, controlling. *General Trading Co.* v. *State Tax Comm'n*, 322 U.S. 335, 337 (1944), *Sutter Butte Canal Co.* v. *Railroad Comm. of Cal.*, 279 U.S. 125 (1929), *American Ry. Express Co.* v. *Kentucky*, 273 U.S. 269 (1927).

In two places petitioner seeks to buttress his position by referring in quotation marks to the testimony of George Greene given at the hearing held by the trial court. (House-

hold Petition, 4, 23.) The language in quotations does not appear at the page cited nor at any other place in the witness' testimony (P. T. Tr. 1966-1981). The testimony of Mr. Greene, in fact, referred to the experience of the Election Department that the police list contained "many people who for some reason or another do not qualify to become voters, through economic conditions, or some other reason ..." (21 P. T. Tr. 1972). The Trial Court made specific findings as to the reason why the list of registered voters was used rather than the police list (I 18 R. 4271). The court's finding was adopted in the opinion of the Supreme Judicial Court of Massachusetts. "The election board used the voter list in preference to the police list because it felt that if the police list were used 'it would result in a larger number or percentage of those summoned being rejected or eliminated for lack of qualifications to serve as jurors than would be the case if the list of registered voters were used." (App. 1380).

Household further argues that the reduction of the original list from 18,000 to 3,000 was also in violation of the Massachusetts statutes (Household Petition, 25). The Supreme Judicial Court held: "In reducing the list from 18,000 to 3,000, there is no evidence that the election board abused the discretion clearly left to it by the statutory scheme" (App. 1381).

Moving from their untenable premises of statutory violation, Household then asserts that the alleged violation substantially affected the make-up of the grand and petit juries. The basis for this assertion is said to be certain statistical tables prepared by an expert for purposes of this trial. Some of these statistics were concededly based on hearsay evidence of personal interviews and the refusal of the Trial Court to admit them was specifically upheld (App. 1382) Other statistical evidence was admitted by the Trial Court but it found that this evidence was insufficient for specific

findings and this ruling was also upheld. (App. 1382). In short, the Supreme Judicial Court and the Trial Court ruled that "... the defendants have not proved 'that there has been any systematic or intentional exclusion of any economic, social, religious, racial, political, or geographical group in the community' " (App. 1381). Certiorari should not be granted on this ground.

III. THERE WAS NO VIOLATION OF CONSTITUTIONAL PROVISIONS IN THE DENIAL OF THE MOTIONS FOR SEVERANCE FILED BY VARIOUS PETITIONERS.

Local and Woodcock[9] assert that the denial of their motions for severance constituted a denial of due process (Local Petition, 9-15; Woodcock Petition, 21-26). This issue is discussed in the opinion below at App. 1386-1391.[10]

The first ground upon which petitioners make this contention is that the joinder of indictments gave the prosecution an unfair tactical advantage. The Petition of Local is uniquely a re-digest of the facts. It points out that a substantial amount of prejudicial evidence was necessarily presented to the jury which was not admitted as to it, and claims that this constitutes unfairness. It is well established, however, that this is not alone enough to compel severance. *Caton* v. *United States*, 407 F.2d 367, 372 (8th Cir. 1969), cert. denied 395 U.S. 984 (1969). *Katz* v. *United States*, 321 F.2d 7, 8 (1st Cir. 1963) cert. denied 375 U.S. 903 (1963). Neither does the second ground asserted by the petitioners—that the defenses of certain co-defendants were antagonistic—alone warrant severance. *Dauer* v. *United*

[9] Liberty adopts all of Woodcock's arguments. (Liberty Petition, p.2 fn. 1).

[10] Forty-nine indictments involving 16 defendants were joined at the first trial, including both conspiracy and substantive bribery charges. In the second trial 21 indictments were joined, involving 15 defendants, also including both conspiracy and substantive bribery charges (App. 1387).

States, 189 F.2d 343, 344 (10th Cir. 1951), *cert. denied* 342 U.S. 898 (1951). *Commonwealth* v. *Millen*, 289 Mass. 441, 459-460 (1935), *cert. denied* 295 U.S. 765 (1935). Woodcock's contention that he was deprived of his right to call co-defendants as witnesses also fails to meet the test. See *Gorin* v. *United States*, 313 F.2d 641, 645-646 (1st Cir. 1963), *cert. denied* 374 U.S. (1963).[11] The proper test is whether there has been a clear abuse of discretion—it must clearly appear that the defendant would not receive a fair trial without a severance when all the circumstances are considered in the light of sound judicial discretion and common sense. *Johnson* v. *United States*, 356 F.2d 680, 682 (8th Cir. 1966), *cert. denied* 385 U.S. 857 (1966). *Baker* v. *United States*, 329 F.2d 786, 787 (10th Cir. 1964), *cert. denied* 379 U.S. 853 (1964).

In the present case the Commonwealth, in seeking joinder in the first trial, relied on the fact that the indictments involved the same basic transaction, with a near coincidence of dates, and the same witnesses, with a logical nexus between the witnesses and defendants, and that grouping the indictments would provide a workable and not unduly long trial, avoiding unnecessary complexity and hardship to the defendants.

The Supreme Judicial Court pointed out that similar grounds could have been given to support the second trial grouping, and stated at App. 1391 that:

> Weighing these considerations against the disadvantages to the defendants arising from joinder, from the point of view of the judge when he decided to grant

[11] Woodcock and Local's contention that they were deprived of the right to cross-examine co-defendants in violation of the rule of *Bruton* v. *United States*, 391 U.S. 123 (1968) is effectively disposed of by the language of the *Bruton* opinion itself, which refused to extend its exclusionary rule to recognized exceptions to the hearsay rule, such as statements of co-conspirators in furtherance of a conspiracy, 391 U.S. at 128 fn.3.

> the Commonwealth's motions, and even in the light of hindsight, we believe that the defendants have not demonstrated sufficient prejudice to them to override the overwhelming benefits of joinder. There was no abuse of the judge's discretion.

It is submitted that this conclusion is correct and that there was no abuse of discretion by the Trial Court and no denial of due process in refusing to fragment trials of such length.

IV. Petitioners Were Accorded Due Process of Law by the Manner in Which the Trial Court Dealt With the Commonwealth's Applications for Issuance of Process to Out-of-State Witnesses.

Farrell, Glynn and Hanley maintain they were denied due process of law when, during the first trial, the Trial Court held an ex parte hearing on the Commonwealth's applications for out-of-state process and, after receiving the representations of the Commonwealth, issued the certificate of materiality contemplated by Mass. Gen. Laws ch. 233, §13A. Farrell and Glynn petition, 13-16; Hanley petition, 10-11.

It is to be noted here that the Trial Court did nothing more than discharge its duty under the statute.[12] It certified only that J. Miller Redfield was a material witness within the terms of G.L. c. 233, §13B, and its finding was entirely neutral as respects petitioners' guilt or innocence. The

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[12] Massachusetts General Laws ch. 233, §§13A-13D, is the Uniform Law To Secure the Attendance of Witnesses From Without the State in Criminal Proceedings. The constitutionality of this statute was upheld in *New York* v. *O'Neill*, 359 U.S. 1 (1958) (Frankfurter, J.). It has been held that the hearing on whether to request the attendance of an out-of-state witness is not criminal in nature and does not infringe on a defendant's right to confront the witnesses against him. See *Epstein* v. *People*, 157 So. 2d 705 (Fla. App. 1963).

certificate cannot possibly be construed as a finding adverse to petitioners and they appear not to assert such a claim here.

The sole question they raise is whether the procedure followed here was so inherently prejudicial as to have denied them due process of law. There is no authority for such a proposition and petitioners cite none. Petitioners infer that the Trial Court was biased against them by virtue of the Commonwealth's representations made at this ex parte hearing but this is sheer speculation, unsupported and unwarranted. The trial court showed the most scrupulous regard for petitioners' rights throughout the entire one hundred ten volume transcript and nineteen volume record in the first trial. Of equal importance, the motions of the Commonwealth to secure the attendance of out-of-state witnesses did not even *mention or refer to* Liberty or Woodcock and it is not possible to draw any inference of their criminality from these motions. I 6 R 1603-1605, 1699-1701, I 7 R 1739-1754, 1762-1773.[13]

The limited representations necessary to establish the need for an out-of-state witness are hardly of the same character as the ex parte relation by the prosecutor of "an episode of sordid behavior" by the defendant in a kidnapping case to the judge who was to pronounce sentence. This was condemned in *Haller* v. *Robbins*, 409 F.2d 857, 859 (1st Cir. 1969). Nor is this a case of violation of rules of criminal procedure limiting what a judge may review during the course of a criminal trial. See *Gregg* v. *United States*, 394 U.S. 489, 492 (1968). In contrast, the Commonwealth's representations here were required by the statutory scheme and went only to the limited question of securing out-of-state witnesses to testify to facts which were for the jury

[13] While Hanley's name was mentioned in certain of these motions, the trial court made no finding whatsoever naming him in its certificates of materiality.

and not the Trial Court to determine. The jury, of course, did not hear these representations and could not have been biased by them.[14] If representations such as these were here to be condemned, no prosecutor could even make an offer of proof during the course of a criminal trial. The petitioners were not prejudiced by the actions of the Trial Court. Certiorari ought not be granted on this ground.

V. There Was Sufficient Evidence to Warrant the Conviction of Woodcock.

Woodcock argues that there was no evidence admitted against him of the authority of the other conspirators to enter into the conspiracy to bribe Hanley and Garfinkle. Absent such evidence, he maintains his conviction of conspiracy is without due process of law. Woodcock petition, 32-33.

This argument does not withstand analysis. It is clear from evidence admitted against Woodcock that as Executive Vice President of Liberty he attended the conspiratorial meeting at the Commodore Hotel. I 50 Tr. 3592. There Glynn told the others that Hanley would handle the Rate Board "program" and would obtain the necessary votes to achieve the rate desired by the conspirators. I 52 Tr. 3748. No one dissented from this scheme—the conspirators only concern was that the amount of the bribe sought by Hanley was excessive. I 52 Tr. 3751-3760. Then Woodcock pegged the amount of the bribe at $25,000 (I 52 Tr. 3761), the other conspirators agreed to pay this amount to Hanley (I 52 Tr. 3762), and the discussion shifted to a consideration of the manner in which the conspiracy was to be effectuated. I 52 Tr. 3763-3771. At this point the offense of conspiracy was complete—the minds of the conspirators had joined in

[14] Petitioners contend that the procedure followed here would be improper in a judge tried case. Whatever the merits of this contention, it is not presented by this case.

agreement to violate the law. As stated in *Commonwealth* v. *Judd*, 2 Mass. 329, 337 (1807) "the offense is complete when the conspiracy is made."

Woodcock's contention that evidence of the corporate authority of the other conspirators was not admitted against him does not operate to void his conviction since it is patently obvious that the other conspirators at the Commodore meeting—Barber, Pratt, Farrell, Glynn, and Heath—all had the *individual* capacity to agree with Woodcock to bribe Hanley and this is what they did. Whatever the motives of these individuals to act as they did—possibly advancement in their respective corporate hierarchies, reciprocal favors from Hanley, or the like—their own individual roles in the conspiracy are not reduced simply because their agreement and acts tended to benefit their corporate employers. There is ample evidence that Woodcock mutually agreed with these other individuals to bribe Hanley and Garfinkle. This evidence is sufficient to support the conspiracy conviction. Certiorari ought not be granted on this ground, particularly where only one litigant is affected.

VI. The Sufficiency of the Evidence of Liberty's Corporate Criminal Responsibility Raises No Federal Question.

At pages 7 through 10 of its petition Liberty contends that it is a denial of equal protection to convict a corporate defendant of a serious crime on the basis of acts by its Executive Vice President committed on behalf of the corporation. The proper standard of corporate criminal responsibility, the necessary difference between treatment of corporate and individual crime, the strong public policy reasons for such differences and the evidence against Liberty are treated in detail at App. 1418-1450. A consideration of the opinion below demonstrates clearly that

this contention by Liberty raises no substantial question for review by this Court.

VII. Woodcock's Conviction as a Principal on the Indictment Charging Him With Bribery Was Based on the Settled Common Law of the Commonwealth and not Upon an Ex Post Facto Application of Mass. Gen. Laws ch. 274, §2.

Woodcock and the other co-conspirators in the first trial specifically delegated to Barber the authority to offer a bribe to Hanley. App. 1405-1407, 1487. The Supreme Judicial Court affirmed Woodcock's conviction of the crime of bribery, holding at 1487: "One may be convicted as a principal where he delegates to an agent the authority to do the act." Since this doctrine was expressly incorporated into a statute passed subsequent to his trial—Mass. Gen. Laws ch. 274. §2, as amended by St. 1968, c. 206, §1, effective July 30, 1968—Woodcock argues that the Supreme Judicial Court must have applied that statute to him in an ex post facto manner. Woodcock petition, 34-37.

This argument is quite artificial since the Supreme Judicial Court nowhere relies on this statute as a basis for Woodcock's liability and, as Woodcock himself admits (Woodcock petition, 37), the Commonwealth never suggested that the new statute should apply. The fatal flaw to this argument lies in the fact that the Supreme Judicial Court, in its decision below, merely restated what had long been the law of the Commonwealth with respect to bribery indictments. Thirty years before the Supreme Judicial Court's decision in the instant case, it had dealt explicitly with these same contentions:

> The defendant contends that since he was not present in any sense when the various payments were

> made, nor . . . when there was talk of paying money for jobs, he could have been nothing more than an accessory to the felony of which he was convicted as a principal. . . . The interposition by a public officer of an agent or "bagman" (to use the popular expression) as a screen against those who voluntarily or under some compulsion are disposed to bribe him, does not reduce him to an accessory. . . . The request or the acceptance may be by an authorized agent; or the acceptance by the public officer may be an acceptance from an intermediary without the knowledge of the person making the gift or gratuity. *Commonwealth* v. *Connolly*, 308 Mass. 481, 489-490 (1941).

The *Connolly* case arose under Mass. Gen. Laws ch. 268, §8 (requesting or accepting a bribe). The particular indictment here arises under Mass. Gen. Laws ch. 268, §7 (offering or giving a bribe). As the Trial Court noted in denying Woodcock's motion for a directed verdict on this indictment:

> Is there any sound or valid reason why both sides to an alleged bribe (the public officer allegedly requesting or accepting it and the other person or corporation allegedly giving, offering or promising it) should not stand on the same footing on the question of whether or not they may be convicted as principals when they commit the crime through agents or intermediaries? I 94 Tr. "Appendix A," vii.

There is, of course, no viable distinction which can be drawn between the public official who solicits a bribe and the individuals and corporations offering to pay it. Woodcock never attempted to draw such a distinction below and the Supreme Judicial Court merely enunciated again a general principal (which had previously been applied to

a cognate statute), applying it to Mass. Gen. Laws ch. 268, §7.[15] There is no question here presented as to the ex post facto application of a statute and certiorari ought not be granted on this ground.

VIII. Petitioners Were Accorded Due Process of Law by the Manner in Which the Changes in Limitations on Evidence Were Effected.

The trial court's practice of placing limitations on evidence during these trials and then changing these limitations after a preliminary finding of conspiracy in each case is well established in Massachusetts. *Commonwealth* v. *Benesch*, 290 Mass. 125, 132-133 (1935). *Commonwealth* v. *French*, Mass. Adv. Sh. (1970) 619, 637, fn. 27. *Commonwealth* v. *Rogers*, 181 Mass. 184, 191 (1902). Even so, Beneficial, Houshold, Local, and Woodcock (with whom Liberty joins) argue that the number of limitations was so great that the jury could not have remembered them all and must necessarily has disregarded the limitations in finding petitioners guilty. Beneficial petition, 11-17; Household petition, 27-32; Local petition, 9-15; Woodcock petition, 21-26. Farrell, Glynn, and Hanley contend that the trial court permitted the prosecutor to determine the final application of the evidence. Farrell and Glynn petition, 16-20; Hanley petition, 12.

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[15] The reliance by Petitioner on *Dolan* v. *Commonwealth*, 304 Mass. 325, 339 (1939) (Woodcock petition, 35-36) does not weaken this argument. The *Dolan* case involved criminal contempt—a serious affront to the judicial system by virtue of jury tampering. See 325 Mass. at 304. The Supreme Judicial Court's citation is preceded by the signal "see" which indicates that the conclusion of the court will be suggested by an examination of the case rather than that its conclusion is stated by the *Dolan* case. A Uniform System of Citation (11th Ed.) §26.15, p. 87. It is thus of no moment that the *Dolan* case may technically have involved a misdemeanor. The point being made by the Supreme Judicial Court was not so restrictive.

A. *Petitioners Are Not Entitled To A New Trial Simply Because The Limitations Upon Evidence Were Numerous, Especially Where There Is No Showing That The Jury Disregarded The Limitations On Evidence Critical To Sustain Each Particular Conviction.*

Petitioners do not appear to contend that any of the trial court's particular announcements regarding changes were inaccurate or misleading. Nor do they contend that the jury was not given suitably strong instructions to give weight to the limitations.[16] Rather they argue that the number of limitations were so great that no one could have remembered them all and this, in itself, is a denial of due process.

But it must be remembered that neither the limitations and the changes thereto, nor the trial court's charge operated in a vacuum. During the course of these trials petitioners' counsel often sought to have the Commonwealth specify the limitations under which it was offering each particular item of evidence. By changing the limitations in the particularized manner adopted here (rather than admit-

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[16] Note these excerpts from the charge of the Trial Court in the first trial: "Each defendant in this case is to be judged solely on the evidence which was admitted as to him or it as to a particular indictment or count. You cannot consider against a defendant evidence which was admitted only against some other defendant or defendants . . . You cannot charge any defendant with anything disclosed by evidence which was not admitted against him . . . Do not decide the case of these defendants as though all of the evidence applied to all defendants. It does not." I 101 Tr. 7217 - 7220. As the Supreme Judicial Court said, "Implicit in these instructions was the admonition that if the jury could not remember the limitations on a given item of evidence they could not consider it." App. 1476. This inference was made explicit by the Trial Court in its charge at the conclusion of the second trial. "If you find yourselves in a state of mind where you are unable to recall whether particular evidence was or was not admitted as to a particular defendant or count, *then you may not consider that evidence as to that defendant or count.*" II 220 Tr. 11, 599 (emphasis supplied).

ting evidence wholesale against all the conspirators after the preliminary finding of conspiracy) the trial court was, in effect, implementing a "safeguard to individualize each defendant in his relation to the mass." *Kotteakos* v. *United States*, 328 U.S. 750, 773 (1946)—a point apparently conceded by Farrell and Glynn. Farrell and Glynn petition, 19 n. 45. The jury could not fail to note that the evidence against the different petitioners was varied. Then, in their summations, petitioners' counsel carefully and exhaustively called to the jury's attention the limitations on the evidence as it applied to each petitioner. This was followed by the trial court's charge which enjoined the jury to give effect to the limitations and, implicitly in the first trial and explicitly in the second, told them not to consider evidence as to which they could not remember the limitations.[17]

Given this background, it can hardly be thought that the jury did not remember and apply the limitations as to the central items of evidence necessary to warrant petitioners' convictions. These were the elements explained in detail during the closing arguments and as to which the trial court had given lucid and comprehensive instructions. Absent some tenable showing that the jury could not recall these crucial items of evidence as limited (Petitioners have made no such showing whatsoever) certiorari ought not be granted on this ground. "Appellate courts should be slow to impute to juries a disregard of their duties." *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 485 (1933).

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[17] Household's assertion that it was error not to give an instruction that, unless all the limitations could be remembered as to the evidence against a petitioner he must be acquitted (Household petition, 27-28), is without merit or supporting authority. If it were adopted, Household would be entitled to acquittal upon a showing that the jury did not remember a limitation as to a collateral matter even though the jury might not have relied on that evidence at all in reaching a verdict.

B. *Petitioners Were Accorded Due Process Of Law By The Decision Of The Trial Court With Respect To The Changes In Limitations On Evidence; The Trial Court Did Not Delegate Its Authority To The Prosecutor.*

Farrell, Glynn, and Hanley argue generally that the trial court abdicated its responsibility over evidentiary rulings to the prosecutor. Their argument, however, prescinds from the Decision of the Trial Court on defendants' "Motions to Strike" Evidence made by the Trial Court during the course of the second trial. Farrell & Glynn petition, 16. See II R 13, 127-13,137. There, in a portion of the decision not quoted by petitioners, the trial court stated that in ruling on evidentiary motions "[T]his Court does not feel that it is bound or limited by the Commonwealth's statement of intent or of its 'rule of fairness'... [I]n the absence of... agreement, this Court will rule on Motions to Strike on the basis of what it understands to be the rules of evidence relating to a trial of this kind." II Tr. 13,130. See App. 1478. This is hardly an improper delegation of judicial authority.

Curiously, petitioners appear to be arguing that they were prejudiced by the admission against them of less than the quantum of evidence which might possibly have been admitted against them under the principle of *Commonwealth* v. *Benesch*, 290 Mass. 125, 132-133 (1935). This attempt to whipsaw the judicial process after seeking limitations below was aptly characterized by the Supreme Judicial Court as "patently specious." App. 1478. If petitions had actually been deeply concerned about the careful changes in limitations announced by the Trial Court, they could have assented to the procedure followed in *Commonwealth* v. *Kiernan*, 348 Mass. 29, 57-58 (1964) *cert. denied sub. nom. Gordon* v. *Massachusetts*, 380 U.S. 913 (1965)

where, by request of counsel, all evidence was admitted *de bene* against all defendants subject to a motion to strike. These petitioners can show no prejudice from the procedure followed below. Certiorari ought not be granted on this ground.

IX. The Decision of the Trial Court To Put Special Questions to the Jury Did Not Deny Petitioners Due Process of Law.

In the first trial, the trial court submitted to the jury four special questions as well as the general verdict forms. In each instance, the jury answered these questions as well as returning their general verdict. Beneficial, Household, Farrell, and Glynn argue that this procedure denied them due process of law. Beneficial petition, 24-27; Household petition, 32-36; Farrell and Glynn petition, 20-21. This argument is without merit.

Special questions do not deprive the jury of its constitutional responsibility to find guilt or innocence. Their use in a state court has never been held to deny a defendant due process of law under the United States Constitution. Indeed, the use of special questions in a complex case of this nature would hardly seem to prejudice the defendants. Far from "catechizing" the jury in the instant case, the questions may well be deemed to have assisted them in keeping separate in their minds the different elements of the substantive crimes and the burden of proof of the Commonwealth as to each of those elements.[13] It is simply not true that the special questions "led the jurors down

[13] Beneficial complains that, by virtue of the special questions, "[t]he jury's attention was riveted on a specific crime before it even faced the central question of guilt." Beneficial petition, 27. This is not prejudicial. Of necessity, the jury must focus on the "specific crime" before it determines the "question of guilt." Absent a "specific crime," the "question of guilt" does not arise.

the guilty trail." Instead the jury expressly found that no bribe was paid by these petitioners. In these circumstances it is most appropriate to characterize the special questions as separate road blocks to the return of a guilty verdict—each one having to be negotiated by thoughtful discussion before petitioners could be found guilty.

Special findings have often been used in treason cases, where the jury was requested to state which overt acts were committed in support of its verdict of guilty. *United States* v. *Kawakita*, 96 F. Supp. 824 (S.D.Cal. 1950), *aff'd* 190 F.2d 506 (9th Cir. 1951), *aff'd* 343 U.S. 717 (1952). Mr. Justice Douglas' opinion in *Kawakita* contains a direct reference to special questions. 343 U.S. at 722. See also *Cramer* v. *United States*, 325 U.S. 1, 36 (1945). Special questions have also been employed in conspiracy cases when to do so would aid the court, as where a statutory penalty was varied during the life of the conspiracy. *United States* v. *Haim*, 218 F.Supp. 922 (S.D.N.Y. 1963). *United States* v. *Ogull*, 149 F.Supp. 272 (S.D.N.Y. 1957) *aff'd sub nom. United States* v. *Gernie*, 252 F.2d. 664 (2d. Cir., 1958), *cert. denied* 356 U.S. 968 (1958). See *United States* v. *James*, 432 F.2d 303 (5th Cir. 1970); *United States* v. *Hensley*, 374 F.2d. 341, 344 (6th Cir. 1967) *cert. denied* 388 U.S. 923 (1967).

The cases relied upon by petitioners to demonstrate a supposed dispute among the circuits as to the constitutionality of special questions actually do not have that effect at all. As the First Circuit explicitly noted (and Household, Farrell, and Glynn admit), the court's action in *United States* v. *Spock*, 416 F.2d. 165, 180 (1st Cir. 1969) was based upon the exercise of its supervisory power. The decisions in the Eighth and Ninth Circuits are based on the court's understanding of federal practice and not on the United States Constitution. *Gray* v. *United States*, 174 F.2d. 919,

924 (8th Cir. 1949). *Anderson* v. *United States*, 273 Fed. 677, 679 (9th Cir. 1921). The Third Circuit decision relied on by petitioners, *United States* v. *Noble*, 155 F.2d 315, 317-318 (3d Cir. 1946), concerns itself with failure of the lower court to instruct the jury on the elements of the crime charged and not at all with the propriety of special questions.

There is thus no precedent for the startling assertion that the procedure followed here—a procedure long recognized in the jurisprudence of the Commonwealth of Massachusetts (*Commonwealth* v. *Bartholomew*, 326 Mass. 218, 221 ( )) — denied the petitioners due process of law. Certiorari ought not be granted on the ground that the trial court posed special questions to the jury in the first trial.

X. The Commonwealth Fulfilled Its Duty of Disclosure to the Petitioners and They Are Not Entitled to a New Trial on This Ground.

All petitioners convicted in the "first small loans case" claim that they must be given a new trial on the ground that the Commonwealth failed to disclose material evidence during the course of that trial. See *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). After a three-day hearing following the first trial, the Trial Court denied petitioners' motions for new trial in a 37-page decision which includes meticulous findings of fact as to the various contentions raised. 19 R 4619-4655. The Supreme Judicial Court affirmed. App.

Woodcock and Liberty contend that the Commonwealth made misstatements of fact to them during the course of the trial and that it intentionally suppressed certain of Heath's grand jury testimony (Woodcock petition, 27-31) Beneficial argues that the expense vouchers of the witness Heath, which were not disclosed until the second trial,

were material evidence on the question of whether three incriminating meetings (during which Hanley first solicited a bribe with respect to the 1962 Rate Board proceedings, *supra*, p. 7) took place between Heath, Glynn, and Hanley during the summer of 1962 (Beneficial petition, 17-18).[19] Household restricts its concern to the expense vouchers covering the period of a luncheon meeting at Purcell's restaurant where Glynn, Pratt and Heath agreed to recommend that a bribe be paid to Hanley. *Supra*, pp. 7-8 (Household petition, 10-13). All of these issues turn on their own facts and only affect this case.

Although the trial court found that the Commonwealth acted with full and complete good faith and did not intentionally withhold from the petitioners any material they were entitled to see (I 19 R 4650) and the Supreme Judicial Court found there was sufficient evidence to support these findings (App. 1482), Beneficial, Farrell, Glynn, and Hanley complain that the expense vouchers were intentionally suppressed purusant to a "deal" with Heath. (Beneficial petition 18-20; Farrell & Glynn petition 21-22; Hanley petition 11-12).

To these contentions there are at least three answers: 1) the evidence derived from the grand jury testimony and the expense vouchers is neither exculpatory nor material; 2) the Commonwealth made no misrepresentations or "deals" with respect to this evidence; and 3) under the circumstances of this case, there was no duty constitutionally imposed on the Commonwealth to turn its voluminous files over to the petitioners.

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[19] Woodcock (and Liberty, which adopts Woodcock's petition on this point — Liberty pet. 2, fn. 1) would appear to espouse this same position (Woodcock petition, 31) even though none of the evidence supposedly impeached by the expense vouchers was ever admitted against either Woodcock or Liberty and the Supreme Judicial Court expressly declined to decide whether either had standing. App. 1480.

A. *In The Circumstances Of This Case, There Was No Duty Imposed On The Commonwealth By The Constitution To Make All Its Files Available To The Petitioners; Evidence Not Disclosed Was Not Material.*

Even if possible inferences might be extracted from the grand jury testimony or expense vouchers so as to arrive at some peripheral inconsistency with Heath's testimony during the first trial, the United States Constitution ought not be interpreted to require the Commonwealth, who made a diligent, good faith effort to search out and disclose to the defense all relevant information in its possession (I 19 R 4650), to make a further day-by-day reevaluation of the twenty-four file drawers of documentary materials in its possession (App. 1483) so as to turn over to petitioners everything which, in their eyes, might conceivably be inconsistent with the day's testimony.

A single example will suffice to demonstrate the impossible burden which petitioners seek to cast upon the Commonwealth. Actually, the only possible inconsistency which arises from the variety of evidence cited by petitioners stems from the fact that Heath testified that he had lunch with Glynn and Pratt at one of the many incriminating meetings while his expense vouchers (which, in any event, would not include the names of Glynn and Pratt) list the names of other individuals at lunch during the relevant period. (see discussion *infra* pp. 41-43).

How, then, is the Commonwealth to make the decision as to which documents to turn over to petitioners? At the outset of the trial the Commonwealth possessed twenty-four file cabinet drawers full of documentary materials obtained from the Massachusetts Crime Commission and had developed an additional six drawers of documents during its trial preparation. In its opening, the Commonwealth de-

scribed the meeting at Purcell's but made no mention of the conspirators lunching there. Thus, the Commonwealth cannot be thought to have anticipated any testimony inconsistent with the vouchers in its possession. It was only on the fiftieth day of the first trial that Heath made passing references to lunching at Purcell's with Glynn and Pratt.

Must the Commonwealth, therefore, after fifty days of trial, comb through all its materials again seeking to cull out vouchers which might, in petitioners' eyes, possibly be inconsistent with Heath's testimony as to lunch?[20] Were this Court to promulgate such a standard as the constitutional mandate, prosecutors in every complex case would be virtually required to turn over their entire file to the defendants lest some peripheral inconsistency crop up during the course of a lengthy trial which, if undetected despite the prosecutor's good faith efforts, would vitiate the verdict.[21]

But the United States Constitution does not require imposing any such strained and impossible burden on the prosecutor. For, as Chief Justice Burger pointed out in *Giglio* v. *United States*, — U.S. —, 40 U.S. Law Week 4209, 4211 (1972):

> We do not . . . automatically require a new trial whenever "the combing of the prosecutor's files after the

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[20] It is, of course, not without significance that Heath testified that he met Glynn and Pratt on the day in question "at Haley's restaurant" and they then went over to Purcells. I 50 Tr. 3529. The most plausible inference is that Heath, a public relations man whose business it was to entertain others, had *already* incurred a reimbursible expense at Haley's before going over to Purcell's with Glynn and Pratt.

[21] As Chief Judge Friendly put it in *United States* v. *Keogh*, 391 F.2d. 138, 147 (2d Cir. 1968): "Any lawyer who has prepared and conducted a trial like this one, lasting 23 trial days, knows how easy it is to forget items in his files that an unexpected turn in the evidence has made helpful to his own case, let alone those that might aid his opponents—something which, under our adversary system, is not in the forefront of his mind."

> trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . ." *United States* v. *Keogh*, 391 F.2d. 138, 148 (2d Cir., 1968). A finding of materiality of the evidence is required under *Brady*."

Petitioners rely heavily on *Giglio* and invite the court to compare that case with this one. The Commonwealth submits that any such comparison will only confirm the propriety of the decision below.

In *Giglio*, the chief witness for the prosecution, Taliento, perjured himself during the course of the trial by denying the existence of an agreement as to his future prosecution and the Assistant United States Attorney, albeit in good faith, permitted this false evidence to go uncorrected. After the trial, another Assistant United States Attorney admitted that it had been agreed that Taliento would not be prosecuted if he cooperated with the government. This Court, confirming its holding in *Napue* v. *Illinois*, 360 U.S. 264 (1959), reversed and remanded for a new trial.

A far different situation is presented by the case at bar. Here, the Commonwealth has expressly denied the existence of any "deal" (II 199 Tr. 10,439) and the grand jury testimony and documentary evidence relied on by the petitioners is either wholly consistent with the testimony of the Commonwealth's witnesses (*infra*, pp. 38-40, 41-42) or, at worst, not directly inconsistent with any of the testimony at trial (*infra*, pp. 42-43). In such circumstances, as this Court has so recently affirmed, "a finding of materiality of the evidence is required." *Giglio* v. *United States*, —— U.S. ——, 40 U.S. Law Week 4209, 4211 (1972).

The requirement that the evidence on which to base a new trial be "material" was laid down in the *Brady* case itself (383 U.S. 83, 87) and has been uniformly interpreted as requiring the defendant to demonstrate more than

peripheral inconsistencies. *United States* v. *Tomaiolo*, 378 F.2d. 26, 28 (2d Cir. 1967) ("To obtain a new trial a convicted defendant must . . . show more than the suppression of evidence. The evidence must also be shown to be material and *of some substantial use* to the defendant.") (emphasis supplied) *Ingram* v. *Peyton*, 367 F.2d 933, 936 (4th Cir. 1966) (The evidence must be "of a character to raise a *substantial* likelihood . . . that it would have affected the result if known at the trial.") (emphasis supplied) See *Lessard* v. *Dickinson*, 394 F.2d 88 (9th Cir. 1968).[23]

This Court's reliance in *Giglio* on *United States* v. *Keogh*, *supra*, serves to reinforce the point Chief Judge Friendly made in that careful decision.

> Failure to appreciate the use to which the defense could place evidence in the prosecution's hands, or forgetfulness that it exists when a development in the trial has given it new importance, are quite different [from cases where there has been a *specific* request for particular documents]. Since this must happen to the most scrupulous prosecutors and the issue of deterrence scarcely arises, the problems of the courts and the wider interests of society unite to require a substantially higher probability that disclosure of the evidence to the defense would have altered the result. 391 F.2d at 148.

In light of these considerations, the Commonwealth submits that none of the evidence argued by petitioners here to require a new trial was, in fact, material. Petitioners' due process rights were not violated by the Commonwealth. Certiorari ought not be granted on this ground.

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[22] Indeed, the commentary to Section 3.11(a), ABA, Standards Relating To The Prosecution Function And The Defense Function, Approved Draft, 1971, states that even the "area of evidence which would *substantially* aid the defense . . . is too vague to be defined in standards of [prosecutorial] conduct." (emphasis supplied). *A fortiori* then, good faith non-disclosure of minor impeaching evidence ought not be construed to be a violation of due process.

B. *The Grand Jury Testimony In Question Was Not Exculpatory.*

The bits and pieces of grand jury testimony thought by Liberty and Woodcock to be exculpatory are peripheral at best. The petitioners Woodcock and Liberty repeatedly mention Heath's "apparently exculpatory grand jury testimony" (Woodcock petition, 28) yet none of his grand jury testimony bearing on the first trial was in fact exculpatory.[23] Woodcock and Liberty first seek to capitalize (See Woodcock petition, 29) on the fact that certain grand jury testimony which they reviewed during the course of the second trial demonstrates that Heath, during a single day of his grand jury testimony, failed to make reference to Woodcock's presence at the Commodore meeting.[24] Heath did not, during this day's testimony before the grand jury, say anything directly inconsistent with his prior testimony. However, Heath had, in previous testimony before the grand jury, definitely named Woodcock as one of the con-

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[23] The first small loans trial dealt with the "Rate Board program" — a euphemism used by the conspirators to describe their conspiracy to bribe Hanley and others to fix the rates to be charged for "small loans". App. 1402. The second small loans trial dealt with the "Hanley program", App. 1507-1505, a continuing conspiracy to bribe Hanley to bestow various favors on the small loans companies. App. 1488. While it is true that Heath's grand jury testimony (and his subsequent testimony at the second trial) has Woodcock at the Commodore meeting trying to extricate Liberty from the continuing Hanley program, it is equally clear that, at that *same* meeting, Woodcock committed Liberty to participation in the Rate Board conspiracy. Compare App. 1513-1514 with App. 1405. Woodcock's refusal to participate further in the Hanley program does not exculpate him from his explicit affirmation ("the figure [i.e., the bribe] is $25,000 and not one penny more") of the means and goal of the Rate Board conspiracy—the subject of the first trial.

[24] This contention was first made in paragraph 23 of petitioners' affidavit accompanying their motion for new trial I 8R 1971. In paragraph 6 of this *same* affidavit, petitioners themselves quote a portion from Heath's grand jury testimony which establishes that Woodcock was present at the Commodore meeting. I 8R 1963 - 1964. I 19 R4647.

spirators at the Commodore meeting. Were this single omission on one day of extended testimony to be inflated to the status of material exculpatory evidence, the Commonwealth would, in future trials, necessarily require each grand jury witness to repeat the aggregate of all his prior testimony every day. As the Trial Court aptly said, "[I]t is not possible to erect the entire walls of a brick building with each brick." I 19 R4646. Heath's single omission to repeat to the grand jury every item of evidence as to which he had testified can hardly be thought to be genuinely material to the question of the guilty of the petitioners. No new trial ought be granted on this ground.

Next, Liberty and Woodcock argue (Woodcock petition, 31) that Heath's testimony about Woodcock's "blackmail"[25] before the grand jury is inconsistent with his testimony at trial that Woodcock and the other individual defendants "were my friends" (I 66 Tr. 4758) and that he was on cordial terms with the Liberty personnel *in his area*.[26] 19 R 4645. There is, in fact, no inconsistency whatever between Heath's grand jury testimony on these points and his testimony at trial. Moreover, Heath's grand jury testimony on these points exculpates neither Liberty nor Woodcock nor is it material to their defense. Heath carefully testified at trial that the other individual defendants *had been* his friends. I 66 Tr. 4758. He never implied that Woodcock was his friend at the time of trial. Moreover, Woodcock, coming from St. Louis, was not in Heath's area and Heath's testimony about his cordial relations with Liberty personnel in his area did not include Woodcock. 19R 4645-4646. Thus, even

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[25] As the trial court noted, "It is questionable whether Heath's interpretation that he was being blackmailed is correct, or whether the correct interpretation is that he, Heath, was being asked by Woodcock to blackmail the defendant Hanley." I19R 4643.

[26] Woodcock's paraphrase of Heath's testimony omits this limiting ing phrase. See Woodcock petition, 31. Heath's actual words were, "I was on cordial terms with all of the personnel in my area." I75 Tr. 5345.

these bits and pieces of collateral grand jury testimony culled by petitioners out of context and juxtaposed against specific testimony in a voluminous trial transcript, prove to be neither inconsistent nor material and the fact that they were not available to Liberty and Woodcock during the first trial does not warrant reversal of their convictions.

C. *The Commonwealth Made No Misstatements of Fact to the Petitioners.*

Finally, Woodcock and Liberty contend that the Commonwealth prejudiced their case by representing to them that if they cross examined Heath about the Commodore Hotel meeting "it would result in the evidence of another crime." 19 R 4648. See Woodcock petition, 28-31. Indeed, there *was* ample evidence of other criminal conduct at the Commodore Hotel meeting beyond that tried in the first small loans trial[27] App. 1512-1513. Thus, both the Trial Court and the Supreme Judicial Court concluded that the Commonwealth's statement was perfectly correct, proper, and truthful. Liberty and Woodcock argue on the basis of their directed verdicts of not guilty in the second trial that there was *no* evidence of their criminality introduced at that trial. This overstates the situation. What actually transpired at the Commodore meeting, as the opinion of the Supreme Judicial Court makes clear, is that Woodcock, after emphatically setting the amount of the bribe in the "Rate Board program" (App. 1405) objected when discussion of the on-going "Hanley program" came up later during that same meeting. From Woodcock's statement that "Liberty had no intention of participating in the Hanley

[27] Both the "Rate Board Program"—the conspiracy tried in the first trial, and the "Hanley program" — the conspiracy tried in the second trial, were discussed at the Commodore meeting. See fn. 25, *supra*.

program *this year*" (App. 1513), (emphasis supplied), a fact finder could reasonably infer that Woodcock, while committing Liberty to the Rate Board conspiracy, was taking Liberty out of the on-going Hanley program.

Equally important, counsel for Woodcock and Liberty had full opportunity to cross examine Heath and Woodcock himself was present throughout the Commodore meeting about which Heath had testified. It must be presumed that Woodcock fully apprised his counsel of the discussions at the Commodore meeting. In these circumstances, factually accurate statements by the Commonwealth can hardly be thought to be misrepresentations which changed defense counsel's trial tactics. Certiorari ought not be granted on this ground.

D. *The Expense Vouchers In Question Were Not Exculpatory.*

Petitioners contend that the expense vouchers are evidence inconsistent with Heath's testimony as to his meetings with various of the other conspirators in Massachusetts. Analysis of the actual facts reveals no inconsistency whatsoever.

It is necessary first to consider the expense vouchers themselves. The vouchers provide spaces for the entry of reimbursible expenses under a separate column for each day of the week and set forth various expense categories for each day including "Breakfast", "Lunch", and "Dinner" (I 19 R 4637). The vouchers were not a complete record of Heath's daily activities but included only records of expenditures for which Heath sought reimbursement from his employer (App. 1481; I 19 R 4638). Meetings with other people are not indicated on the vouchers unless Heath spent money on the meal of someone else and sought reimbursement therefor (I 19 R 4638). Heath's own meals in Boston were not reimbursible and, more important, he had

been explicitly instructed "that he should not include the names of any public relations men for other companies on his expense vouchers" (I 19 R 4638).

There is thus no inconsistency between the limited information recited on the expense vouchers and Heath's testimony as to his three meetings with Glynn and Hanley in the summer of 1962. Glynn was a public relations man for another company (I 47 Tr. 3352) so Heath would not have recorded his name on the expense vouchers in any event. Nor were the three meetings with Hanley and Glynn during which Hanley first solicited a bribe, "social occasions" where Heath would pay, and thus might be expected to seek reimbursement for, a pro-rata share of Hanley's expenses (I 19 R 4639-4641). See I 48 Tr. 3440, 3448, 3450-3451. Finally, the fact the expense vouchers show Heath having lunch or dinner with persons other than Hanley and Glynn during the summer of 1962 is not inconsistent with his testimony at trial since Heath never testified that these three meetings with Hanley and Glynn were luncheon or dinner meetings (See I 50 Tr. 3518-3525) while there was ample testimony that Heath often met them casually for a drink (See e.g., I 54 Tr. 3914).

In short, there was no testimony at trial from which it might even be *inferred* that Heath, as a result of his midsummer meetings with Hanley and Glynn, incurred a reimbursible expense which would have shown up on his expense vouchers. Thus the vouchers do not tend to exculpate the petitioners from the incriminating nature of the evidence as to these meetings (See App. 1401-1402) because the vouchers do not, even by implication, tend to show that these meetings did not take place.

Nor are the expense vouchers covering the period of the Purcell's meeting inconsistent with Heath's testimony at trial. It is true that Heath testified that he met with Glynn and Pratt at Purcell's restaurant for lunch (App.

1403) and that Heath's expense vouchers for this period show him lunching with other individuals. But this supposed inconsistency vanishes under scrutiny.

Heath had explicit instructions not to record the names of Glynn or Pratt (a public relations man for Household — App. 1400) on his expense vouchers. As Heath's own meals were not reimbursible (I 19 R 4638) nothing concerning the Purcell's meeting would have appeared on his expense vouchers in any event. The fact that Heath sought reimbursement for lunching with others during this period is placed in proper perspective when it is noted that Heath testified that he met Glynn and Pratt *at Haley's restaurant* and the three then went to Purcell's (I 50 Tr. 3229). There is no inconsistency inherent in these two items of evidence. Clearly, the expense vouchers are nothing more than *additional* evidence of Heath's activities. They in no way controvert his trial testimony.

E. *The Commonwealth Never Agreed To Any Impropriety With Respect To The Expense Vouchers—There Was No "Deal."*

Beneficial, Farrell, Glynn, and Hanley all moved for a new trial on the basis that the Commonwealth made a "deal" with Heath to withhold material exculpatory evidence from them.[28] These petitioners introduced no evidence at the hearing on their motions (I 19 R 4635). They relied instead on affidavits containing two excerpts of testimony from the second trial. In the first excerpt, Heath said it was his "understanding" that the expense vouchers were not going to be used at trial (II 149 Tr. 7556). In the second, Marshall Simonds, a Special Assistant Attorney General

[28] The supposed "deal" relates to the expense vouchers which the Commonwealth has already argued were not exculpatory. *Supra*, pp. 41-42.

who had assisted in the presentation of evidence to the grand jury, testified that "I told [Heath] that I understood his hope and request that they would not become in any way involved in any public proceedings and I told him I would do what I could to accomplish that *so long as my efforts did not interfere with the proper investigation of the matter* (II 199 Tr. 10441-10442) (emphasis supplied). Simonds also flatly denied that he had promised Heath his expense vouchers would not be used (II 199 Tr. 10, 439) and testified that he informed Heath that he was not the Assistnat Attorney General in charge of the prosecution or the presentation of evidence (II 199 Tr. 10,442).

These isolated comments hardly make out a "deal" by the Commonwealth. Simonds was not the individual who determined what portion of the Commonwealth's files were to be turned over to the petitioners. Indeed, he had specifically told Heath that his willingness to refrain from using the expense vouchers was conditioned upon the propriety of such action—"so long as my efforts did not interfere with the *proper* investigation of the matter" (emphsis supplied). This limiting language demonstrates that the Commonwealth never agreed to any impropriety with respect to the expense vouchers and Simonds told Heath so. The best refutation of the story of an alleged "deal," however, is the fact that the Commonwealth itself voluntarily produced these expense vouchers during the course of the second trial. This is hardly consistent with the "deal" theory. The Trial Court, who had the opportunity to observe both Simonds and Heath—the latter over much of the course of the longest criminal trials in the Commonwealth's history—found explicitly, in accordance with Simonds's testimony, that "that the Commonwealth *DID NOT* make a deal with Heath to suppress his expense vouchers " (I 19 R 4636). Certiorari should not be granted on these grounds, particularly since these questions turn on their own facts and affect few, if any, other litigants.

XI. The Petitioners Were Not Twice Placed in Jeopardy for the Same Offense.

Household and Beneficial claim that their trial for conspiracy in the second trial on Indictment 11908 should have been barred on grounds of double jeopardy because of their prior conviction for conspiracy in the first trial under Indictment 11900 (Household Petition 19-23; Beneficial Petition 21-24). This issue is considered in the opinion below at App. 1391-1393.

While the charging language of the indictments is the same, they were sufficiently dissimilar with respect to dates and persons named to raise a material question of fact as to whether the two conspiracies were in fact the same. The bills of particulars and Representations of Evidence filed by the Commonwealth prior to the commencement of the second trial showed that the two conspiracies were not the same, but constituted two separate, well defined agreements. The conspiracy involved the first trial was a narrow agreement, limited in time, having as its sole purpose the making of a "one shot" payment to Hanley for himself and members of the Rate Board in connection with the 1962 Rate Board hearing. In contrast, the conspiracy in the second trial involved a continuing agreement to make annual payments to Hanley so that he would take a position favorable to the small loans industry "... in order to insure in general that his official acts were in the bests interests of the small loans industry." (App. 1391-1392). The evidence at the trials confirmed the existence of two separate agreements, involving separate offenses, having a number of different parties as well as some similar parties, and involving different time periods (App. 1398-1412; 1488-1514). The finding of fact by the court below that two separate agreements existed was correct, and provides no basis for the granting of the writ.

The result reached by the Supreme Judicial Court is fully consistent with federal decisions, which require an examination of the evidence to determine whether or not there is in fact double jeopardy, *Short* v. *United States*, 91 F.2d 614, 620-623 (4th Cir. 1937); *United States* v. *H. E. Koontz Creamery, Inc.*, 257 F. Supp. 295 (D. Md. 1969); *United States* v. *American Honda Motor Co., Inc.*, 271 F. Supp. 979 (N.D. Cal. 1967); See *Duncan* v. *Tennessee*, U.S. , , 40 U.S. Law Week 4206, 4207 (1972) (dissenting opinion of Mr. Justice Brennan). This Court should not be required to make such a lengthy examination of 20,000 pages of transcript.

The decision below meets fully the standards of *Benton* v. *Maryland*, 395 U.S. 784 (1969), and the contentions made by Household and Beneficial provide no basis for the relief sought.

XII. The Petitioner Hanley Was Fully Advised of His Right to Counsel.

The petitioner Hanley contends, at pages 12 and 13 of his petition, that he was not adequately advised of his right to counsel. This issue is covered in the opinion of the court below at App. 1530-1531.

During the first trial Hanley was represented by counsel. Before the commencement of the second trial Hanley's attorney made a motion to withdraw his appearance. At the hearing on that motion the trial judge said to Hanley, who was himself a lawyer and a member of the Massachusetts Bar: "[T]here is a standing order in Suffolk County that a lawyer who once files an appearance for a Defendant in a criminal case may not withdraw that appearance without leave of court" (App. 1530). "Hanley then informed the court that he understood, but preferred to appear pro se in the second trial" (*Ibid.*). The judge was aware that

Hanley was a lawyer and a member of the Massachusetts Bar (*Ibid.*).

It is apparent that Hanley's contention that he was not advised of his right to counsel is flatly contradictory to the record, which demonstrates that the judge informed him that his attorney could not withdraw without the court's permission. Hanley's understanding was manifested by his expressed desire to represent himself. As the Supreme Judicial Court points out at App. 1530, Hanley, in the proceedings before the Supreme Judicial Court, "... failed to point to even one instance of his alleged incompetence". No substantial question is raised by Hanley's contentions, and no reason for granting the writ.

Conclusion

For the foregoing reasons, the Commonwealth respectfully submits that each of these petitions seeking a writ of certiorari to review the opinion and judgment of the Supreme Judicial Court of Massachusetts ought be denied.

Respectfully submitted,

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